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[illegible], PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-455

PHILIP A. GILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his conviction for failure to file income tax returns on the ground that the jury should have been given his requested instruction relating to a defense of lack of mental responsibility.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of willfully failing to file an income tax return for 1970, in violation of 26 U.S.C. 7203.[1] The court sentenced petitioner to a year in prison, all but three months of which was suspended, imposed two years' probation, and fined him $5,000 (Pet. 7). The court of appeals affirmed by order (Pet. App. 25).

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[1]Petitioner was acquitted on similar charges for 1968 and 1969 (Pet. 7).

The pertinent evidence may be summarized as follows: Petitioner is a practicing attorney. On December 5, 1972, an Internal Revenue agent called petitioner and inquired as to his 1971 tax return. Petitioner advised the agent that he had not filed returns for the previous three years and that he did not have any legitimate reason for failing to file (Tr. 43).[2] A few weeks later, petitioner filed tax returns for 1968 through 1970 (Tr. 24).

At trial, a psychiatrist testified for the defense that petitioner had a mental disorder, which he called a "passive-agressive personality" (Tr. 151), which resulted in the "quite common inability to meet deadlines" (Tr. 152). In the psychiatrist's opinion, the failure to file was not "what I would call willful" (Tr. 155). He conceded, however, that failure to meet deadlines was a quite common failing (Tr. 166). A government psychiatrist testified that although petitioner suffered from a passive-aggressive personality (Tr. 201), there was no indication that he suffered from any mental illness (Tr. 199). In his opinion, petitioner "was capable of willfully failing to file his income tax return" (Tr. 203). Petitioner did not claim insanity; rather, he expressly disclaimed such a defense (Tr. 139). However, he requested the following instruction, which the trial court refused to give (Pet. 5):

> There has been testimony offered on the question of the defendant's capacity to commit the offense charged. The rule which you should apply in assessing this evidence is as follows: a person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or

[2]"Tr." refers to the transcript of trial proceedings.

> defect he lacks substantial capacity to conform his conduct to the requirements of the law.

The court did, however, charge the jury that it should consider the evidence of petitioner's mental condition in determining the element of willfulness (Pet. 5-6; Tr. 281-282).

1. Petitioner argues (Pet. 7-12) that the trial court erred in refusing to give his requested jury instruction concerning his mental capacity. But, in so contending, petitioner confuses the defense of lack of criminal responsibility (insanity) (see ALI, *Model Penal Code*, Sec. 4.01 (Proposed Official Draft, May 4, 1962); cf. new Rule 12.2(a), Fed. R. Crim. P.) with the admission of evidence of mental disease or defect not amounting to insanity (diminished responsibility) (see ALI, *Model Penal Code*, Sec. 4.02(1) (Proposed Official Draft, May 4, 1962); cf. new Rule 12.2(b), Fed. R. Crim. P.). When there is evidence to support a claimed insanity defense, it is universally settled that the defendant is entitled to the kind of instruction requested here. See *United States* v. *Brawner*, 471 F. 2d 969, 979-981 (C.A. D.C.). However, petitioner expressly disclaimed any defense of insanity (Tr. 139), and the defense psychiatrist did not testify that petitioner was unable to conform his conduct to the requirements of the law. Accordingly, there was no basis in the record for giving the instruction requested by petitioner, and the trial court correctly refused to give it.

Petitioner correctly notes (Pet. 9, 12) that the courts of appeals are divided on the question whether evidence of mental illness short of insanity but nevertheless relevant to intent is admissible. Some courts hold that such evidence is not admissible. *United States* v. *Haseltine*, 419 F. 2d 579, 581 (C.A. 9); *United States* v. *Ming*, 466 F. 2d 1000, 1004-1005 (C.A. 7). Other circuits have held that such

evidence is admissible on the issue of intent. *United States* v. *Brawner, supra,* 471 F. 2d at 998-1002; *Rhodes* v. *United States,* 282 F. 2d 59, 60-61 (C.A. 4), certiorari denied, 364 U.S. 912. But petitioner has no cause for complaint, because the trial court gave him the full benefit of the more liberal rule of admissibility. The evidence he proffered with respect to his claim of mental illness was admitted (Tr. 149-157), and the jury was expressly instructed to take it into account in determining the element of willfulness (Tr. 281-282; (Pet. 5-6). Since petitioner consciously chose not to raise the defense of lack of responsibility, the trial court correctly refused to give the insanity instruction embodied in ALI, *Model Penal Code,* Sec. 4.01, *supra* (Pet. 5).

2. Petitioner further contends (Pet. 13-19) that the court of appeals was required to write an opinion explaining its reasons for affirming the judgment of conviction. But there is no statute or rule of procedure that requires the courts of appeals to write opinions when deciding cases. While this Court may exercise its supervisory power and require a lower court to write an opinion in an extraordinary case (*Taylor* v. *McKeithen,* 407 U.S. 191), the general rule (*id.* at 194, n. 4) is that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances" such as was done in this case. See also *National Labor Relations Board* v. *Amalgamated Cloth. Wkrs. of Amer., AFL-CIO, L. 990,* 430 F. 2d 966 (C.A. 5); *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of N.Y.,* 431 F. 2d 409 (C.A. 5).

3. Finally, petitioner claims (Pet. 19-22) that the district court, when the jury sent it a note asking for "the definition of willful and willfulness" (Tr. 304), should have given a supplemental instruction rather than merely furnishing them with the cassette from which

they could replay the original instructions. The charge on willfulness (Tr. 287-290), as petitioner concedes (Pet. 19), was correct. There was, therefore, no need for a supplemental charge in language different from that originally given. Moreover, petitioner asked that the original instruction be repeated to the jury (Tr. 305). See *Johnson* v. *United States,* 318 U.S. 189, 200-201.[3]

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[3]Petitioner further asserts (Pet. 17-18, n. 5) that it was undisputed that he filed his returns and paid his taxes before he was first visited by the Intelligence agents; that he was truthful in every respect in the several interviews with the agents; and that he was aware that his delinquency would cost him substantially. Petitioner contends that the trial judge refused to give his requested instruction, which incorporated these facts, for the jury to consider as raising possible inferences against willfulness. But the trial court instructed the jury, *inter alia,* that "willfulness may be inferred from all the facts and circumstances in evidence * * *"; that in determining whether or not the defendant acted willfully, the jury could consider, along with the other evidence in the case, the prior and subsequent acts relating to his prior and subsequent income tax investigation; and that such evidence might indicate whether he was acting in good faith or whether he was intending to do that which he was forbidden to do (Tr. 290).

Petitioner also argues (Pet. 18, n. 5) that the district court erred in denying his motion for a new trial, in which he sought to prove that the prosecution was discriminatory because "there existed within the IRS a written policy which gave 'special priority' to the prosecution of tax crimes by attorneys and CPAs" (Pet. 18, n. 5). But as this Court stated in *Oyler* v. *Boles,* 368 U.S. 448, 456, "selective enforcement" is not in itself forbidden; rather, the exercise of prosecutorial discretion is subject to challenge only upon proof that selection of a particular defendant for prosecution "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" (*ibid.*). While some courts have extended this type of defense to the case where a particular defendant has been able to show he was singled out for prosecution because of his exercise of certain constitutionally protected rights (see *United States* v. *Falk,* 479 F. 2d 616 (C.A. 7) (*en banc*)), petitioner's assertion that he was prosecuted because he was a lawyer does not make out even a colorable case of discriminatory prosecution.

Wright v. *United States*, 250 F. 2d 4 (C.A. D.C.), and *United States* v. *Petersen*, 513 F. 2d 1133 (C.A. 9), upon which petitioner relies (Pet. 20-21), are distinguishable. In those cases, the trial judge either refused to answer the jury's supplemental question or answered it in a misleading manner. *Little* v. *United States*, 73 F. 2d 861 (C.A. 10) (Pet. 22), is likewise distinguishable. There, a court reporter—an "outsider" (*id.* at 867)— was permitted to enter the jury room during its deliberations. Here, however, the court volunteered the assistance of the bailiff—the liaison official between the court and the jury—to assist the jury in finding the pertinent instruction on the cassette.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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[4]Moreover, there is nothing in the record to support petitioner's claim (Pet. 21) that the jury called for the bailiff's assistance.